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IN THE

**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1943

No. 181

CARL LIPPARD AND PAUL LIPPARD,

Petitioners,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA,
RESPONDENT, OPPOSING PETITION FOR WRIT
OF CERTIORARI

STATEMENT OF THE CASE

The petitioners, Carl Lippard and Paul Lippard, seek by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Mecklenburg County imposing sentence upon the petitioners for conspiracy to violate the laws of North Carolina, relating to the possession, transportation, and sale of intoxicating liquors. The opinion of the Supreme Court of North Carolina was filed May 19, 1943, and is reported as *STATE v. CARL LIPPARD AND PAUL LIPPARD*, 223 N. C. 167.

FACTS

The petitioners, Carl Lippard and Paul Lippard, were indicted at the June 22, 1942, term of Mecklenburg County Superior Court, together with certain other defendants, upon a charge that they did "unlawfully and wilfully conspire, confederate and agree together to buy, possess, possess for the purpose of sale, transport and sell intoxicating liquor." (R. 2). Although the indictment also charged consummation of the conspiracy, the case was submitted to the jury solely as a prosecution for conspiracy (R. 110-128) and was so regarded in the Supreme Court of North Carolina (R. 186). Both petitioners were found guilty (R. 4).

The petitioners interposed pleas of former jeopardy. Evidence was offered that Carl Lippard and Paul Lippard had previously been tried on separate warrants charging each of them separately with actual violation of the prohibition laws (R. 33-34). The petitioners pleaded guilty to these former charges (R. 36 and 43). The presiding judge held that the pleas of former jeopardy were not good as a matter of law (R. 46).

Upon conviction of the charge of conspiracy, the petitioners appealed to the Supreme Court of North Carolina assigning as error the denial of their pleas of former jeopardy, the overruling of their motion for a bill of particulars, the refusal of the court to declare a mistrial and allow a continuance, and certain rulings upon the admissibility of evidence. The Supreme Court of North Carolina affirmed their conviction.

ARGUMENT**I****THE DENIAL OF PETITIONERS' PLEAS OF FORMER JEOPARDY DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.**

The United States Supreme Court has never decided that the Constitution of the United States protects an individual against "double jeopardy" or successive prosecutions for the same offense in a state court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

Barron v. Baltimore, 7 Pet. 243;
United States v. Lanza, 260 U. S. 377.

This court has intentionally refrained from deciding whether the guarantee of due process afforded by the Fourteenth Amendment protects an individual against successive prosecutions for the same crime in a State court.

Dreyer v. Illinois, 187 U. S. 71, 85;
Keerl v. Montana, 213 U. S. 135, 138;
Shelvin-Carpenter Co. v. Minnesota, 218 U. S. 57, 67.

Assuming, however, that the Fourteenth Amendment protects an individual against double jeopardy in a State court, no substantial federal question is presented by this petition, for, under the decisions of this Court, it clearly appears that the petitioners have not been placed in jeopardy twice for the same offense.

The petitioners pleaded guilty on April 15, 1942, (R. 35 and 36) to warrants charging each of them separately with the manufacture, purchase, possession, possession for pur-

pose of sale, sale, and transportation of intoxicating liquors (R. 33 and 34). They were separately charged with actual violations of the laws relating to intoxicating liquors, no joint action of any kind or agreement between them being alleged. The subsequent prosecution, out of which this petition arises, charged a conspiracy of the petitioners and others to violate the laws of North Carolina relating to intoxicating liquors (R. 2). In determining the sufficiency of the plea of former jeopardy, the Supreme Court of North Carolina, following well established local precedents, held that successive prosecutions, even though growing out of the same transaction, do not result in double jeopardy unless the offenses charged are the same in law and in fact. The court concluded that the plea of former jeopardy was bad as a matter of law because a conspiracy and actual violation of the laws relating to intoxicating liquors are different offenses.

The Supreme Court of the United States, like the Supreme Court of North Carolina, has made identity of the offenses charged the test of whether a second prosecution results in double jeopardy.

Burton v. United State, 202 U. S. 344;
Gavieres v. United States, 220 U. S. 338;
Ebeling v. Morgan, 237 U. S. 625;
Morgan v. Devine, 237 U. S. 632;
Blockburger v. United States, 284 U. S. 299.

None of the elements of a conspiracy to commit a crime and of the consummated offenses are the same. The essential element of a conspiracy is an agreement to do an unlawful act. It is immaterial whether the act is actually carried out. On the other hand, in a prosecution for the consummated offense, it is immaterial whether two or more persons conspired to commit it. Although the same facts and circumstances may reveal both a conspiracy and a consummated crime, the proof required for each is different.

Considerations such as those stated above have prompted the United States Supreme Court, like the Supreme Court

of North Carolina, to hold that a conspiracy and the consummated crime are separate and distinct offenses.

United States v. Rabinovich, 238 U. S. 78;
Heike v. United States, 227 U. S. 131.

Furthermore, this Court has held the prohibition against double jeopardy in the Fifth Amendment is not violated by separate punishments for a conspiracy and the consummated offense.

Carter v. McClaughry, 183 U. S. 365.

As Justice Holmes observed in *Heike v. United States*, 227 U. S. 131, 144:

"At all events, the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offense at which the conspiracy aims."

Convictions in the lower federal courts for both conspiracies and the consummated offenses have been frequent. Separate punishments have not been found repugnant to the Fifth Amendment.

Freeman v. United States, 244 Fed. 1 (C. C. A. 7th)
Certiorari Denied 245 U. S. 654;
Bens v. United States, 266 Fed. 152 (C. C. A. 2d);
Moorehead v. United States, 270 Fed. 210 (C.C.A. 5th)
petition dismissed 257 U. S. 643;
United States v. Panilla, 299 Fed. 714 (C. C. A. 3d);
Vlassis v. United States, 3 F. (2d) 905 (C. C. A. 9th);
Chew v. United States, 9 F. (2d) 348 (C. C. A. 8th);
Hilt v. United States, 12 F. (2d) 504 (C. C. A. 5th);
Mitchell v. United States, 23 F. (2d) 260 (C. C. A. 9th)
Certiorari Denied, 277 U. S. 594;
Curtis v. United States, 67 F. (2d) 943 (C. C. A. 10th).

In the face of overwhelming authority to the effect that separate prosecutions for a conspiracy and for the consummated offense do not constitute double jeopardy, the denial of the petitioners' pleas of former jeopardy does not present a federal question of sufficient importance to warrant the allowance of the petition.

II

THE ARGUMENT THAT THE PETITIONERS DID NOT HAVE A FAIR AND IMPARTIAL TRIAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTIONS.

Under Question No. 2, the petitioners contend that the proceedings in the State Court were violative of the due process clause of the Fourteenth Amendment in that the petitioners were denied a fair and impartial trial. In connection with this argument, it is contended that the evidence of a certain witness should not have been admitted and that the trial judge was disqualified by reason of bias. These matters are discussed under Questions Nos. 3 and 4 of the Petitioners' brief and will be discussed under Parts III and IV of this brief.

Disregarding, for the moment, the contentions mentioned above, which will be discussed elsewhere, the argument of the petitioners is based principally upon two alleged violations of the Fourteenth Amendment: (1) The failure to grant a bill of particulars to petitioners, and (2) the failure to secure an impartial jury.

The petitioners do not now, nor have they at any stage of the proceedings, questioned the legal or constitutional sufficiency of the bill of indictment. By the indictment (R. 2), they were clearly put on notice that the offense charged was a conspiracy to violate the laws of North Carolina relating to intoxicating liquors. This Court has held that the sufficiency of a bill of indictment in a state court is not a federal question.

Caldwell v. Texas, 137 U. S. 692;

Davis v. Texas, 139 U. S. 651;
Re Robertson, 156 U. S. 183;
Moore v. Missouri, 159 U. S. 673;
Howard v. North Carolina, 191 U. S. 126;
Barrington v. Missouri, 205 U. S. 483.

A fortiori, the question whether a bill of particulars should be granted is not a federal question.

The argument that the petitioners were denied an impartial jury is not based upon the enumeration of specific grounds for the disqualification of any individual jurors who tried the case. It is suggested, however, that a newspaper account of the trial judge's remark before the trial of this case that the case would not be called "unless the big fellows are brought in" (R. 11) prejudiced the jury. Yet it does not appear from the record that this remark was made in the presence of any of the jurors or that a single juror had read or heard of the newspaper article. The large number of prospective jurors examined and excused is indicative of painstaking efforts to secure an impartial jury rather than of a disregard of the constitutional rights of the petitioners. Although the petitioners assert that they should have been permitted to examine the jurors further after the association of private counsel with the public prosecutor, the record is devoid of any suggestion as to what inquiries would have been made in addition to those made by the court on its own motion (R. 27). The North Carolina Supreme Court relied upon the absence of any indication in the record of the interrogatories which the petitioners wishes to propound (R. 190) in affirming the conviction.

None of these matters in connection with the selection of the jury raises any questions except questions of state law. None of them is of sufficient seriousness to warrant a conclusion that the constitutional rights of the petitioners were violated. The selection of the jury and the ruling of the court upon challenges do not ordinarily present federal questions.

Hayes v. Missouri, 120 U. S. 68;

Spies v. Illinois, 123 U. S. 131;
Barrington v. Missouri, 205 U. S. 483;
Buchalter v. New York, 87 L. ed Adv. Ops. 1088.

III

THE COMPETENCY OF THE TESTIMONY OF L. W.
TEETER IS NOT A FEDERAL QUESTION.

Ordinarily, objections to the competency or relevancy of testimony in a state court do not present a federal question.

Brooks v. Missouri, 124 U. S. 394;
Sherman v. Grinnell, 144 U. S. 198;
Barrington v. Missouri, 205 U. S. 483;
Buchalter v. New York, 87 L. ed Adv. Ops. 1088.

However, where it has appeared that confessions have been obtained from a defendant by compulsion and in flagrant disregard of constitutional rights, this Court has sometimes assumed jurisdiction to determine whether the admission of confessions in a state court violated the Fourteenth Amendment.

Chambers v. Florida, 309 U. S. 227.

The admission of the testimony of the State's witness, L. W. Teeter, of which petitioners complain, presents no question comparable to those considered of sufficient seriousness to require review by this Court in cases such as *Chambers v. Florida*. Although the petitioners complain of alleged improper influences while the witness was being examined by officers prior to the trial, their objection is not to the admission of any statement elicited from him, but to the competency of the testimony given in open court by the witness in person. The answer of the North Carolina Supreme Court to objections to this testimony seems sufficient:

"Testimony to the effect that the witness hauled liquor from Baltimore to Charlotte for the defendants was given by the witness himself, from the witness stand in the due course of the trial, and it cannot be assumed that such testimony was induced by hope or extorted by fear. It would rather be assumed, since there is an absence of the contrary appearing, that the judge would have protected the witness from any abuse." (R. 190).

The case of *McNabb v. United States*, 87 L. ed Adv. Ops. 579, upon which petitioners rely, is not in point, for it is concerned with a prosecution in the federal courts, and the decision rests upon statutory rather than constitutional grounds.

IV

THE ALLEGED EXPRESSION OF OPINION BY THE TRIAL JUDGE IS NOT SUFFICIENT TO RAISE A QUESTION OF HIS DISQUALIFICATION UNDER THE FOURTEENTH AMENDMENT.

There can be no doubt that the Fourteenth Amendment guarantees to a person accused of crime the right to be tried before an impartial judge.

Tumey v. Ohio, 273 U. S. 510.

The facts upon which the petitioners rely, however, are wholly insufficient to raise a question as to the disqualification of the trial judge under the Fourteenth Amendment. The record contains no suggestion that the trial judge had any interest, personal or pecuniary, in the outcome of the trial. There was no evidence that the judge was prejudiced by personal animosity toward the petitioners. Although the petitioners complain of alleged errors of law, the record does not disclose, and apparently the petitioners do not contend, that

the presiding judge was guilty of any misconduct in the actual trial of the case or that he failed to conduct himself with strict judicial impartiality.

The only fact upon which the petitioners rely is that, prior to the trial of the case, the judge had refused to proceed against other defendants indicted jointly with the petitioners until the petitioners could be apprehended, and that he had remarked that he would not feel right about trying the little fellows until the big fellows were brought in. From the affidavits of the petitioners (R. 11-16), it appears that these remarks were made by the judge in discussing with counsel the time at which the case should be called. Although they were published against the wishes of the judge (R. 13 and 16), they were not made during the trial, and there is no evidence that any of the jurors who tried the case heard of them. Remarks of this character made prior to the trial of a case are not sufficient to raise a federal question as to the disqualification of the judge.

V

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONERS FAILED TO SET UP A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES IN THE STATE COURTS.

Although an attempt has been made to show that the questions set out in the petition for writ of *certiorari* are not federal questions or are not of sufficient substance and importance to justify the allowance of the writ, the State of North Carolina also contends that this Court is without jurisdiction to allow the petition, for the petitioners failed to set up any of these questions as *questions arising under the Constitution of the United States* in the State courts.

Careful examination of the record will show that, although the petitioners took numerous exceptions to alleged errors of

law, they failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina (R. 186) treats the exceptions taken by the petitioners as raising questions of State law only. No federal questions are mentioned. The petition for writ of *certiorari* filed in this Court omits any allegation that federal questions were set up as such in the State courts.

Under the statute authorizing review by *certiorari* of decisions of the highest courts of the several states, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U. S. C. 1940 ed., Sec. 344.

The rights, privileges, or immunities must be set up in the state courts.

Hartford Life Ins. Co. v. Johnson, 249 U. S. 490.

CONCLUSION

The questions set out in the petition are not federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were set up in the State courts as questions arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

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